United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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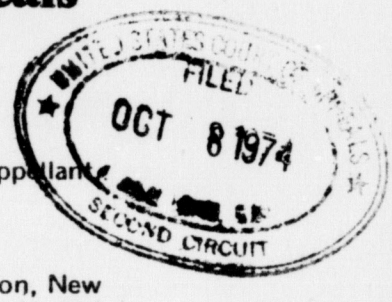
74-2291

United States Court of Appeals

For the Second Circuit.



UNITED STATES ex rel. DAVID BLOOMFIELD,
Petitioner-Appellant,

v.

LOYIS GENGLER, Warden, Federal House of Detention, New York, New York, and THOMAS E. FERRANDIA, United States Marshal for the Southern District of New York,
Respondents-Appellees.

JOHN BENNETT ETTINGER,
Petitioner-Appellant,

v.

THOMAS E. FERRANDIA, United States Marshall,
Respondent-Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

JOINT BRIEF FOR APPELLANTS

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Preliminary Statement

David Allan Bloomfield and John Bennett Ettinger appeal from judgments of the United States District Court for the Southern District of New York (CONNER, J.), rendered September 24, 1974, dismissing appellants petitions for writs of habeas corpus, and dismissing accompanying orders to show cause.

In denying the writs, the Court adopted the decision of United States Magistrate GERARD L. GOETTEL (Southern District of N.Y.) which was dated August 21, 1974 and which resulted from extradition proceedings instituted against the appellants, seeking their return to Canada.

By stipulation of the parties, and with the approval of this Court, a joint brief and joint appendix are being submitted on behalf of both appellants.

Questions Presented

1. Whether under the WEBSTER-ASHBURTON Treaty the appellants, who had been acquitted of criminal charges in Canada, should be returned to Canada to serve seven-year prison sentences which were subsequently imposed *in absentia*, after *in absentia* convictions of the same charges.

2. Whether, under the circumstances of this case, rights to Due Process of law under Amendment V of the United States Constitution would be violated by extraditing them to Canada.

3. Whether there was probable cause to believe that appellants were guilty of the crimes charged.

TREATY INVOLVED

WEBSTER-ASHBURTON treaty of 1842, Article X,
(8 Stat. 572, 576)

> "It is agreed that...upon mutual requisitions...(the United States) shall deliver up to justice all persons charged with the crime of ... committed within the jurisdiction of (Canada)...who shall seek an asylum, or shall be found...: provided that this shall be done upon such evidence of criminality as, according to the laws of the place where...the person so charged will be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed."

WEBSTER-ASHBURTON treaty, Article VII as amended, 7/12/1889 (26 Stat. 1510)

> "The provisions of the said Tenth Article and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed."

WEBSTER-ASHBURTON treaty, as amended 1/8/25 (44 Stat. 2100)

> (The following crimes are added)
>
> " 17. Crimes of offences against the laws for the suppression of the traffic in narcotics."

STATEMENT OF FACTS

Background

Appellants DAVID ALLAN BLOOMFIELD and JOHN BENNETT ETTINGER and another man, WILFRED JULIAN CORMIER, were indicted in 1972 in Canada for conspiracy to import, conspiracy to export, and conspiracy to traffic in hashish. After a trial was commenced and testimony taken the charges against appellants were dismissed by the Canadian County Court.

Appellants, American citizens and residents, thereupon returned home to the United States. Pursuant to Canadian law the Crown appealed and the judgment was reversed by the Supreme Court of New Brunswick, Appeal Division. The Court thereupon chose, apparently arbitrarily, which of the three counts to convict upon. The count charging conspiracy to import was chosen and both appellants were sentenced in absentia to mandatory minimum seven-year prison terms. Had a different count been chosen by the Court no minimum sentence would have been required.

Extradition proceedings were commenced after appellants were arrested in the Southern District of New York. They resulted in an order by United States Magistrate Gerard Goettel ordering the appellants to be returned to Canada.

Thereafter, a petition for a writ of habeas corpus was sought and dismissed, resulting in this appeal.

THE LOWER COURT'S FINDING OF THE EVIDENCE AGAINST THE APPELLANTS

Cormier, the third person (not involved in this appeal) cleared crates containing tapestries with concealed hashish through Canadian customs (opinion:* p.2; Appendix: A 10). The Canadian authorities had discovered the hidden hashish earlier, and appellants as well as Cormier were under surveillance at that time (opinion: p.2; Appendix: p.49).

After Cormier picked up the tapestries containing hashish, he put them into a rented car (opinion: p.2; Appendix: p. A 10). At that time the appellants were parked nearby in a different car and followed Cormier for some distance (opinion: p.2; Appendix: p.A 10). Apparently both cars took a northward route from Saint John, New Brunswick, where the freight station was located, toward Fredericton (opinion: p.2; Appendix: p. A 10).

At some point Cormier turned his car around and travelled back towards Saint John at rapid speeds (opinion: pp.2-3; Appendix: A 10-11). On his way back his car was stopped and he was arrested (opinion: p.3; Appendix: p. A 11).

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*All page references to "opinion" refer to the opinion of United States Magistrate GERARD L. GOETTEL, dated 8/21/74, which was adopted by the District Court (CONNER, J.) in the judgment being appealed herein.

Appellants were arrested at a road block 50 miles north of Saint John, and a road map was found in their automobile showing a route from Saint John to Fredericton, to Forest City, to Bangor, Maine (opinion: p.3; Appendix: p. A 11). If a border crossing were made at Forest City at night, there would be no customs officers on duty but if the most direct route to Bangor from Saint John had been taken, the crossing should have been at Calais where the vehicle would have been subject to a customs search (opinion: p.3; Appendix: P. A 11).

Following the arrests Cormier and Ettinger made confessions which were later ruled involuntary and inadmissible (opinion: pp.3-4; Appendix: pp. A 11-12).

POINT I

UNDER THE CIRCUMSTANCES OF THIS CASE, THE APPLICABLE TREATY DOES NOT PROVIDE FOR EXTRADITION OF THE APPELLANTS.

The WEBSTER-ASHBURTON Treaty of 1842 with Great Britain (8 Stat. 576) provides that the United States would, upon proper request, "deliver up to Justice" (i.e. extradite) all persons charged with certain crimes,

> "provided that...according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension... if the crime or offense had there been committed." (WEBSTER-ASHBURTON Treaty, Article X; 8 Stat. 576).

Thus, the clear and unequivocal language of the Treaty provides that the law of the place where the person who is charged is found, determines whether he should be extradited. Appellants were found in New York.

It is undisputed in this case that in the Canadian trial of appellants, when they were present and represented by counsel, the appellants were acquitted of all charges after the Crown had presented all of its evidence (see Opinion of United States Magistrate GERARD GOETTEL which was adopted by the lower court in this proceeding: Appendix pp. 9-31).

Under the applicable law of the State of New York, the place where appellants were found, their apprehension would not have been justified "if the crime or offense had there been committed", by virtue of New York's, and the United States' s guarantees against Double Jeopardy. NEW YORK CIVIL PROCEDURE LAW, Article 40; also see Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). Accordingly, that portion of the lower court's opinion, which rejects appellants assertions of Double Jeopardy (opinion pp. 22-3; Appendix pp. A 29-30) in reliance on In Re Ryan (360 F. Supp.270 (E.D.N.Y.1973) aff'd 478 F.2d 1397 (2d Cir.1973), a case decided under a different treaty, is wrong, and this Court should reverse that erroneous finding.

Additionally, it should be pointed out that the following Amendment of the WEBSTER-ASHBURTON Treaty is inapplicable to this case:

> "The provisions of the said Tenth Article and of this Convention shall apply to persons convicted of the crimes therein respectively named and specified, whose sentence therefor shall not have been executed" (26 Stat. 1510).

Appellants were concededly convicted by Canada upon appeal in absentia and without a new trial, of one of the charges that had previously been dismissed (opinion of Magistrate GOETTEL, pp. 5-6; Appendix, pp.A 13-14). It further appears that this was done without affording appellants any opportunity to

present a defense or to call witnesses since apparently the Canadian trial court dismissed the indictment after the Crown had completed presenting its proof.

A trial in absentia is likely to be unfair. Therefore, it is the established law of extradition that a person convicted in absentia is not treated as a person convicted, but as a person charged. United States v. D'Amico, 177 F. Supp. 648 (S.D.N.Y. 1959); United States ex rel Argento v. Jacobs, 176 F. Supp. 877, 879 (N.D. Ohio 1959); Ex parte La Mantia, 206 Fed. 330, 331 (S.D.N.Y. 1913); Ex parte Fudera, 162 Fed. 591, 592 (C.C.S.D.N.Y. 1908), appeal dismissed, 129 U.S. 589. For the purposes of these extradition proceedings, therefore, the appellants must be considered "persons charged" (Article X, 8 Stat. 576 (1842)) rather than "persons convicted" (26 Stat. 1508, 1510 (1889)).

POINT II

BY ORDERING EXTRADITION THIS COURT WOULD BE DENYING APPELLANTS OF DUE PROCESS OF LAW, AS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Generally a federal court will not, in a habeas corpus proceeding challenging extradition from the United States, inquire into the procedures of the foreign jurisdiction that await the relator. The reason for that is the broad Treaty Power afforded to the Government. It must be remembered, however, that the Treaty Power provided by Article VI of the United States Constitution does not authorize what the Constitution otherwise forbids. Goeffrey v. Riggs, 133 U.S. 258, 267 (1890); Reid v.Covert, 354 U.S. 1, 16-17 (1957). Furthermore, although the circumstances under which a fugitive is to be extradited are normally determined by the Executive Branch of the Government (Secretary of State) and will not be examined by the Judicial Branch, this Court has, on the facts of certain cases "confess(ed) to some disquiet at this result" and has suggested that under certain circumstances it might find foreign procedures or punishments "so antipathetic to a federal court's sense of decency as to require re-examination" of that principle. Gallina v. Fraser,278 F.2d 77, 79 (2d Cir. 1960). This is such a case.

Appellants, American citizens and residents of the United States, were arrested and charged in Canada with three counts of conspiracy to export, import, and traffic in, hashish. A trial commenced wherein they were present and were represented by counsel. That trial resulted in dismissal of all charges after the Crown presented its evidence. Having been acquitted, the appellants returned to their homes in the United States. Thereafter, while the appellants were still in the United States, the Canadian Government appealed the acquittal and the judgment was partially reversed: the appellate court arbitrarily chose one of the three charges which had been dismissed; it summarily declared appellants guilty, and sentenced them in absentia to a mandatory minimum seven-year sentence. Had the court chosen one of the other counts instead, no minimum sentence would have been required.

The opinion of the United States Magistrate at the conclusion of the extradition hearing, adopted by the court below, found no violation of the appellants' Due Process rights but it did evidence disquiet at the result it reached, as demonstrated by the suggestion that "...the Canadian Courts should give some consideration to resentencing these defendants following extradition" (opinion of U.S. Magistrate GOETTEL, p.21; Appendix p. 30). The erroneous finding that no violation of constitutional rights had occurred was based primarily on Neely v. Henkel 180 U.S. 109, (1901); Holmes v.Laird, 459 F. 2d 1211 (D.C.Cir.1972); and Gallina v. Fraser, 177 F.Supp.856 (D.Conn 1959),278 F.2d 77(2d Cir. 1960).

Those cases are not controlling of the current one.

The Neely and Holmes cases did not involve extradition after in absentia foreign determinations of the relators' guilt. They involved international extradition from the United States for trial on criminal charges and, therefore, the holdings are inapposite to the instant case.

In the Gallina case, when ordering the petitioner to be extradited to Italy, this Court noted in its opinion that a new trial had been assured the petitioner upon his return to Italy, an important assurance which is absent in the instant case. Moreover, the Gallina case contained another important distinguishing factor: Gallina admitted his guilt of the crime for which he was being extradited to the United States Magistrate. Without the confession and the assurance of a new trial it is not clear that this Court would have reached the conclusion that it did. The absence of those two factors in the instant case should prevent it from reaching the same result because by ordering Mr. Bloomfield and Mr. Ettinger to be sent to a Canadian jail for seven year terms which were imposed in absentia, this Court would be depriving them of Due Process of law.

Parenthetically, we point out that in our research we have found cases that involved extradition of United States citizens from the United States to a foreign country after in absentia determinations of guilt.* We are aware of no case where under those circumstances an American was ordered extradited to a

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* Ex parte Fudera, 162 Fed.591(C.C.S.D.N.Y.1908), appeal dismissed 219 U.S. 589 (1911); United States ex rel Argento v.Jacobs, 176 F. Supp.877(N.D.Ohio,1959); Ex parte La Mantia,206 Fed.330 (S.D.N.Y. 1913); In re D'Amico,177 F.Supp.648 (S.D.N.Y.1959); Gallina v. Fraser, 278 F.2d 77 (2d Cir.1960).

foreign jurisdiction without prior assurance from the foreign sovereign that a new trial would be conducted. This case should not be the first.

POINT III

THERE IS INSUFFICIENT EVIDENCE TO FIND PROBABLE CAUSE OF APPELLANTS' GUILT.

In a habeas corpus proceeding, it is appropriate for the court to examine whether the magistrate had jurisdiction, whether the offense charged is within the applicable treaty and whether there was any competent evidence warranting a finding that there was reasonable ground to believe that the accused was guilty. The conclusion of the courts below that there was probable cause to believe appellants guilty of a crime are clearly unsupportable from the findings of fact.

The court below adopted Magistrate GOETTEL'S findings as they are set forth in his opinion, dated, 8/21/74 (Appendix; pp.9-31). Essentially, those findings were that appellants had been seen "meeting and talking" with another person, Cormier, who had "cleared through customs" certain tapestries containing hidden hashish (2); that when Cormier picked up the packages, he put them into a car and drove away; and that appellants, who were in a different car, followed (2). Cormier was arrested and the defendants were also arrested (3). Magistrate GOETTEL'S opinion does not indicate that the appellants and Cormier were arrested in proximity to each other, nor does it indicate when each arrest was made. It appears, however, that he did not find the separate arrests were close in time or place: appellants were arrested at a road block 50 miles north of Saint John, while Cormier was arrested when his car was stopped by authorities as he was

travelling in his vehicle (3). Furthermore, there was nothing in the opinion to indicate that appellants' vehicle was following Cormier at the time of their arrest. In addition to the above, the Court also found that a map with an inked route was found in appellants' vehicle (3). Ettinger and Cormier confessed after their arrests, but the confessions were suppressed upon appeal (4). Bloomfield never made any incriminating statements.

Those factual findings do not substantiate the conclusion that there was probable cause to believe that appellants may have been guilty of any crime. The finding that they had "met and talked" with Cormier showed no probability of criminality on appellants' part. It showed only that appellants had associated with Cormier. Proof of association with a criminal is insufficient to infer even a probability of guilt. Therefore, the conclusion of Magistrate GOETTEL as adopted by the court below are unsupportable by the findings of fact and the defendants should not be extradited.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT DISMISSING APPELLANTS' PETITIONS FOR WRITS OF HABEAS CORPUS AND DISMISSING THE ORDERS TO SHOW CAUSE SHOULD BE REVERSED; THE WRIT SHOULD BE SUSTAINED; AND APPELLANTS DISCHARGED.

Respectfully submitted,

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October, 1974

STATE OF NEW YORK)
: SS:
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 3 day of OCTOBER, 1974 deponent served the within Brief upon U.S. Attorney

attorney(s) for Appellee

in this action, at U.S. Courthouse Foley Sq New York N.Y.

the address designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

ROBERT BAILEY

Sworn to before me, this
3 day of OCT. 1974

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976